Supreme Court, U. S.
FILED
MAY 27 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1480

ROBERT C. BANNERT,

Petitioner,

vs.

AMERICAN CAN COMPANY,

Respondent.

MOTION FOR LEAVE TO FILE AN AMENDED PETITION FOR CERTIORARI

JOSEPH LEVIN

DICE, SWEENEY AND SULLIVAN, P.C.

Attorneys for Petitioner

1000 Detroit Bank & Trust Building
Detroit, Michigan 48226
313/962-5909

AMERICAN BRIEF AND RECORD COMPANY, 125 WEALTHY STREET, S.E., GRAND RAPIDS, MICHIGAN 49503 — PHONE GL 8-5326

MOTION FOR LEAVE TO FILE AN AMENDED PETITION FOR CERTIORARI

Subsequent to the filing of our April 13 Petition For Certiorari, the Supreme Court of Michigan handed down its decision in *Woodward* v *Cadillac Overall Supply Co.*[1]

That decision of the Michigan Supreme Court is inconsistent with the decision of the United States Court of Appeals on the controlling issue of Michigan law in this case.

Three of the Justices refused to decide whether the forfeiture of the retirement benefits of a voluntary[2] retiree on account of post-retirement competition is unreasonable as a matter of law and remanded the case back to the trial court for the development of the facts in the case.[3] Two of the

---

[1] ..... Mich ....., ... NW 2d ..... (1976), reprinted in the Appendix to Petitioner's Reply and Supplemental Brief, Pages 9-35.

[2] The appeal in *Woodward* arose from the denial of plaintiff's motion for summary judgment (Appendix to Petitioners' Reply and Supplemental Brief, Page 10) on which

> "Defendants allege[d] that plaintiffs, upon resigning from the employ of defendants, entered into the employment of competing firms." Appendix to Petitioners' Reply and Supplemental Brief, Page 14.

[3] These three Justices held that that question, along with other questions, was

> "not properly presented for our consideration by this motion for summary judgment but depend upon facts which must be developed at trial. See *Hubbard* v *Mil-*

Justices would have held such a forfeiture unreasonable, as a matter of law, without the development of additional facts.[4]

Both opinions in the Michigan Supreme Court reject the position of the United States Court of Appeals in this case

---

[3] (Continued):

ler, 27 Mich 15; 15 Am Rep 153 (1873), and *Reed* v *Kaydon Engineering Corp.*, 38 Mich App 353; 196 NW 2d 487 (1972)." Appendix to Reply Brief, p. 11.

In *Hubbard*, the Court held that the reasonableness of a covenant not to compete depends "upon all the surrounding circumstances". 17 Mich 19, 15 Am Rep 157 (emphasis added).

In *Reed*, the Court reversed a summary judgment on whether the contract there was "unconscionable and should be denied enforcement" holding that

> "[w]hether a contractual provision is substantively unreasonable or unconscionable depends on the circumstances — on the facts; as it has been said, on the 'commercial setting, purpose and effect' of the provision. See *Williams* v *Walker-Thomas Furniture Co.*, 121 US App D.C. 315, 319; 350 F2d 445, 449 (1965)" (emphasis added).

[4] The Chief Justice and Justice Williams joined in an opinion concluding that a clause providing for such a forfeiture of retirement benefits on account of post-retirement competition is "an unreasonable restraint of trade unless there are reasonable limitations in time and area." Appendix to Petitioner's Reply and Supplemental Brief, Page 12. [There were no such time or area limitations in either that case or this case. *Ibid.;* Appendix To Petition For Certiorari, Pages 12-13 and 25-26.]

which *held* that the forfeiture of the retirement benefits of a voluntary retiree is reasonable as a matter of law.[5]

---

[5] Reversing the decision of the District Court, which had found that the forfeiture of the retirement benefits of the voluntary retiree here was unconscionable in the light of other facts in the case, the United States Court of Appeals — citing decisions of Michigan intermediate appellate courts — *held*:

> "The Michigan Court of Appeals' summary rejection in *Tobin* [v *General Motors Corp.*, 17 Mich App 475, 169 NW 2d 644 (1969) (a case concerning a forfeiture of bonus awards)] of the claim that the forfeiture provisions of the General Motors Bonus Plan were 'illegal and/or void' and its recognition in *Couch* [v *Difco Laboratories*, 44 Mich App 44, 205 NW 2d 24 (1972) (specifically reserving for future decision the question of whether a clause providing for such a forfeiture is 'unreasonable or unconscionable' (44 Mich App 50, 205 NW 2d 27))] of the employer's interest in retaining key employees and discouraging them from going to work for a competitor lead us to conclude that the Michigan courts would not find forfeiture unconscionable or unreasonable here. This is particularly so where an employee voluntarily resigns and accepts employment with a competitor since, as we have noted earlier, a suspension of benefits will not effectuate a central purpose of the plan, to induce employees to remain with the corporation."

Bannert v *American Can Company*, 525 F2d 104, 109-110 (6th Cir. 1975), Appendix To The Petition For Certiorari, Page 36 (emphasis added).

The District Court found that on the facts of this case the forfeiture was "unconscionable".[6] The decision of the Court of Appeals, in reversing the District Court as a matter of law, is contrary to Michigan law as elucidated in *Woodward.*

Prior decisions of this Court require a summary reversal of the decision of the United States Court of Appeals and a remand of this case to that Court with instructions to reconsider its decision on the controlling question of Michigan

---

[6] "Plaintiff had been an employee of the defendant since 1950. At the time of his retirement, August 1, 1971, he was the General Manager of the can manufacturing operations of three (3) American Can Company plants. At that time he was fifty-six (56) years of age. His retirement was voluntary and was classified as early retirement under the terms of the pension plan.

[Congress, in the Employee Retirement Income Security Act of 1974 enacted after the trial of this case, set minimum retirement benefit vesting standards precluding the forfeiture of the retirement benefits of an employee of Bannert's age (56 years of age) with his many years of service (21 years of service). 29 U.S.C. 1053.]

"The Plan provided for payment to the plaintiff from the date of retirement of $435.60 per month, of which $96.63 was a result of his own contribution and $338.97 was a result of contributions by the defendant.

• • •

"In this case, the plaintiff accepted a position as Manager — Can Fabrication Operation with PepsiCo, Inc., at the time of his retirement from the American Can Company, and he has been working since that time for PepsiCo, Inc., in that capacity.

• • •

law in the light of the April 21 opinions of the Michigan Supreme Court in *Woodward.*[7]

---

[6] (Continued):

"There is no evidence in this case that the plaintiff had or used any trade secrets. Three to four hundred people in the country had information and skill equal to that of the plaintiff. All can manufacturing operations proceed with the same basic knowledge and from the same basic premises as that of American Can and are managed by persons of skill comparable to that of the plaintiff. The machinery and knowledge used by the plaintiff in setting up and beginning operations of the PepsiCo can manufacturing operations and by him in his position as manager of the PepsiCo can manufacturing operations was known to the industry generally. He did not use machinery and knowledge unknown to the industry. In fact, counsel for the defendant conceded in open court there was nothing in this case relating to the abuse of any of defendant's private information or secrets. . . ." Opinion of the District Court, Appendix To The Petition For Certiorari, Pages 11-12, 13, 16.

[7] In *Vandenbark* v *Owens-Illinois Co.,* 311 US 538, 541, 542, 543 (1941), this Court stated:

> '[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. [*United States* v *Schooner Peggy,* 5 US (1 Cranch) 103, 110 (1801)].'

• • •

"[T]he principle quoted has found acceptance in a variety of situations. • • • *Sioux County* v *National*

[footnote continued on next page]

There is no need for an immediate conclusion to this case.[8]

The issuance of an Order granting this Motion would enable Petitioner and Respondent to brief fully in accordance with Rules 23 and 24 of this Court (an initial Brief, a Brief in Opposition and a Reply Brief) the following

---

[7] (Continued):

Surety Co. [276 US 238, 240 (1927) reversing a federal court of appeals decision conflicting with a subsequent decision of the highest state court on a controlling question of state law]."

• • •

"[W]e are of the view that, until such time as a case is no longer *sub judice,* the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court (citation omitted). Any other conclusion would but perpetuate the confusion and injustices arising from inconsistent federal and state interpretations of state law.

• • •

"While cases were pending here on review, this Court has . . . vacated judgments of state courts because of contrary intervening decisions . . . ."

As Justice Frankfurter noted,

"[f]or purposes of diversity jurisdiction a federal court is, 'in effect, only another court of the State.' (citations omitted)"

Angel v *Bullington*, 330 US 183, 187 (1947).

[8] See Petition For Certiorari, Page 9, second paragraph.

new question in this proceeding:

> In a diversity of citizenship case, should this Court reverse a federal Court of Appeals decision on a controlling issue of state law inconsistent with a subsequent decision of the highest state court issued while the federal case is still pending in this Court?

WHEREFORE, Petitioner prays that this honorable Court will authorize the filing of an Amended Petition For Certiorari on that question.

JOSEPH LEVIN

DICE, SWEENEY & SULLIVAN, P.C.
Attorneys for Petitioner Bannert

1000 Detroit Bank & Trust Bldg.
Detroit, Michigan 48226
(313) 962-5909